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91ST CONGRESS }
2d Session }

SENATE

{ REPORT
No. 91-1059

MAJ. CLYDE NICHOLS (RETIRED)

JULY 30, 1970.—Ordered to be printed

Mr. BURDICK, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 6850]

The Committee on the Judiciary, to which was referred the bill (H.R. 6850) for the relief of Maj. Clyde Nichols (retired) having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of H.R. 6850 is to relieve Maj. Clyde C. Nichols (retired) of liability to the United States in the amount of \$3,836.09, representing overpayments of base pay made to him from December 18, 1954, through December 31, 1962, through administrative error which included his Naval Reserve midshipman service as creditable for pay purposes. It allows for credit in the amounts of any certifying or disbursing officer for amounts for which liability is relieved. It would also authorize the Secretary of the Treasury to pay to Major Nichols the amount received or withheld from him because of the overpayments.

STATEMENT

In its favorable report on the proposed legislation, the House Judiciary Committee set forth the facts of the case as follows:

The Department of the Air Force in its report to the committee indicated that it had no objection to the bill in view of the special circumstances of the case. The Comptroller

General questions relief but takes the view that the determination of whether legislative relief should be extended in this particular case is a matter to be determined by Congress.

Major Nichols enlisted in the Air Force on April 1, 1953, as an aviation cadet. He was discharged from this enlistment on December 17, 1954, upon completion of this training. The next day he accepted a commission in the Air Force Reserve and remained on continuous active duty until placed on temporary disability retirement on October 14, 1967. He receives retirement pay at the rate of \$611.93 a month.

When Major Nichols was commissioned in the Air Force Reserve, an incorrect pay date was established for him. This included time spent in the Naval Reserve Officers Training Corps (NROTC) which he had included as enlisted Navy Reserve service in his pay date application. This error went undetected and a pay date of January 9, 1950, was established for him. Upon his transfer to the Regular Air Force in 1959, this pay date was listed in the Air Force Register. In 1961 his pay date was adjusted to November 18, 1949, by Seymour Johnson Air Force Base, to give him credit for an additional month and 21 days in the Naval Reserve.

The Air Force Accounting and Finance Center (AFAFC) reviewed the military pay record on which this adjustment was made in November 1962. Major Nichols was asked to complete a statement of service to assure that proper pay adjustment would be made him. He completed this on January 16, 1963, listing enlisted service in the "Navy Reserve (ROTC) from September 3, 1949, to January 15, 1953"; as contrasted to the "enlisted Naval Reserve service from September 27, 1949, to December 18, 1952" which he had claimed when commissioned in the Air Force Reserve. He also listed his pay date as November 18, 1949. An adjustment of \$138.93 was paid to him on February 13, 1963.

The committee notes that this correction was made by Major Nichols and serves to emphasize the finding by the Air Force that he acted in good faith in this connection.

Early in 1963, a military records review, independent of that conducted by AFAFC, disclosed that Major Nichols' midshipman service while in ROTC was not creditable for pay purposes under section 205, title 37, United States Code. Determination was made that the pay dates of January 9, 1950, and November 18, 1949, were both in error. A pay date of April 1, 1953, was established for him through the deletion of credit for the time he served as a midshipman in the NROTC. Effective the pay period beginning January 1, 1963, his basic pay and flight pay entitlements were adjusted to the April 1, 1953, pay date.

A complete audit of Major Nichols' pay records was made and the April 1, 1953, pay date confirmed. Major Nichols was informed that during the period December 18, 1954, through December 31, 1962, he had been overpaid basic pay and flight pay to the amount of \$3,836.09. He appealed this indebtedness

on June 11, 1963, and the validity of the indebtedness and the requirement for repayment were confirmed. Deductions from his active duty pay were initiated on July 1, 1963, at the rate of \$53.27 a month. At this rate, collection would have been completed in 6 years.

Major Nichols was assigned to duty in Vietnam in June 1967. Shortly after his arrival he received wounds which necessitated his removal to Wilford Hall Hospital, Lackland Air Base, Tex. On October 14, 1967, he was placed on the temporary disability retired list. Initially he indicated that he would elect to waive retirement pay in favor of benefits provided under laws administered by the Veterans' Administration. His remaining indebtedness to the Air Force of \$1,119.32 was, therefore, collected from the final pay and allowances due him which included a lumpsum leave payment. He did not exercise this option and is presently receiving retirement pay of \$611.93 a month.

The Department of the Air Force states that the overpayments made to Major Nichols were the result of administrative error, and as noted above has stated that he has repaid in full the overpayments made to him.

Inasmuch as there are no administrative provisions under which repayment may be made to Major Nichols, and that he acted in good faith in making repayment of the overpayments made to him, the committee agrees, in view of the special circumstances of this case, that favorable consideration should be given to this measure. Accordingly, the committee recommends that the amended bill be favorably considered.

The committee after a review of the foregoing, concurs in the action taken by the House of Representatives and recommends favorable consideration of H.R. 6850, without amendment.

Attached hereto and made a part hereof are (1) a letter dated February 15, 1968, from the Comptroller General, and (2) a letter dated April 9, 1968, from the Department of the Air Force:

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., February 15, 1968.

B-163014.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: Further reference is made to your letter of November 30, 1967, requesting our views on H.R. 13859, 90th Congress, a bill for the relief of Maj. Clyde Nichols, U.S. Air Force, retired.

Under section 1 of the bill, Major Nichols would be "relieved of liability to the United States in the amount of \$3,836.09, representing overpayments of base pay received by him for the period beginning April 1, 1963, and ending December 31, 1962, as a result of inclusion by the Air Force, through administrative error, for pay purposes of 3 years and 9 months of service by the said Clyde Nichols as a midshipman in the U.S. Naval Reserve."

Section 1 further provides that in the audit and settlement of the accounts of any certifying or disbursing officer of the United States "credit shall be given for amounts for which liability is relieved by this section."

The Secretary of the Treasury is authorized and directed, in section 2 of the bill, to pay to Major Nichols, out of any money in the Treasury not otherwise appropriated, "an amount equal to the aggregate of the amounts paid by him, or withheld from sums otherwise due him, with respect to the indebtedness to the United States specified in the first section of this Act."

Major Nichols enlisted in the U.S. Air Force April 1, 1953. He served on active duty as an enlisted member from that date until he became a commissioned officer in the Air Force on December 18, 1954. His active duty status in the Air Force continued through October 13, 1967, on which date he was released from active duty and placed on the temporary disability retired list effective October 14, 1967, in the temporary grade of major, U.S. Air Force. We are advised that prior to his enlistment and active duty in the Air Force and while a student at Vanderbilt University, Major Nichols was a midshipman in the Naval Reserve Officers' Training Corps from September 27, 1949, to December 18, 1952, inclusive, a period of 3 years, 2 months and 22 days.

The period of Major Nichols' midshipman service in the Naval Reserve Officers' Training Corps as a college student did not constitute active or inactive duty in the naval service and hence was not creditable in establishing his monthly basic pay either as an enlisted member or as a commissioned officer of the Air Force. However, in a statement of service executed by Major Nichols incident to his appointment as a commissioned officer in the Air Force in December 1954, he claimed credit for the period September 27, 1949, to December 18, 1952, inclusive, as "enlisted service" in the U.S. Naval Reserve. Such statement was inaccurate and quite obviously resulted in the administrative error leading to the overpayment covered by H.R. 13859.

In the reexamination by this Office of Major Nichols' active duty pay accounts it has been found that he was in fact overpaid \$3,851.09, or \$15 more than the amount shown in H.R. 13859. His military pay records disclose that the amount of \$3,836.09 has been lawfully collected by the Air Force from Major Nichols (see 5 U.S.C. 5514), leaving uncollected as of the present time the small sum of \$15 mentioned above. It appears that the amount of the bill should, therefore, be changed to \$3,851.09. Also, the phrase "as a result of inclusion by the Air Force, through administrative error, for pay purposes of 3 years and 9 months of service by the said Clyde Nichols as a midshipman in the U.S. Naval Reserve" should be changed to read "as a result of inclusion by the Air Force, through administrative error, for pay purposes of 3 years, 2 months, and 21 days of service by the said Clyde Nichols as a midshipman in the Naval Reserve Officers' Training Corps while a student at Vanderbilt University."

Except for the amount of \$15, mentioned above, the entire amount of the overpayment made to Major Nichols has been liquidated by legally authorized withholdings from his active duty pay accounts

during the period July 1963 to October 1967, inclusive. Thus, as the matter now stands, Major Nichols has received only \$15 in excess of the amount of active duty pay (including incentive-hazardous duty pay) to which he was entitled under the applicable provisions of law governing active duty pay and allowances. The fact that through an administrative error (probably induced by the erroneous statement of service he submitted in December 1954) he received and returned the additional amount of \$3,836.09 in excess of the sums lawfully due him, should not increase his rights in the matter.

Overpayments do occur from time to time and quite often, as in this case, the error is not detected by the administrative officials for a considerable period of time. The lapse of time merely adds to the amount of the liability when the overpayment is discovered, but for obvious reasons such fact cannot be employed as a legal basis to regain the amount overpaid after collection thereof has been lawfully accomplished. Congress has recognized the right of the Government and the duty of the accounting officers of the Government to recoup overpayments of the nature here involved directly from active duty or retired pay. Favorable action on H.R. 13859 would set at naught the administrative action taken in this case under the express authority of 5 U.S.C. 5514. We believe Congress intended that the cited statutory provisions were to have uniform application to all members of the uniformed services.

In our view of the matter we perceive no equities which would justify relief in this case and, hence, we do not favor enactment of H.R. 13859. Of course, the question of granting the proposed relief to Major Nichols is a matter of policy for the Congress to decide.

A similar bill, S. 2860, 90th Congress, was introduced in the Senate on January 23, 1968, and referred to the Senate Committee on the Judiciary.

Sincerely yours,

FRANK H. WEITZEL,

Assistant Comptroller General of the United States.

DEPARTMENT OF THE AIR FORCE,
Washington, April 9, 1968.

HON. EMANUEL CELLER,
*Chairman, Committee on the Judiciary,
House of Representatives.*

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of the Air Force with respect to H.R. 13859, 90th Congress, a bill for the relief of Maj. Clyde Nichols (retired).

H.R. 13859 would relieve Maj. Clyde C. Nichols (retired) of liability to the United States in the amount of \$3,836.09. The bill states this amount represents overpayments of base pay made to him from April 1, 1953, through December 31, 1962, through administrative error which included his Naval Reserve midshipman service as creditable for pay purposes. It allows for credit in the accounts of any certifying or disbursing officer for amounts for which liability is relieved. It would also authorize the Secretary of the Treasury to pay

to Major Nichols the amount received or withheld from him because of the overpayments. Agent or attorney fees are limited to 10 percent of the amount which would be appropriated by H.R. 13859.

Major Nichols enlisted in the Air Force on April 1, 1953, as an aviation cadet. He was discharged from this enlistment on December 17, 1954, upon completion of this training. The next day he accepted a commission in the Air Force Reserve and remained on continuous active duty until placed on temporary disability retirement on October 14, 1967. He receives retirement pay at the rate of \$611.93 a month.

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The Air Force Accounting and Finance Center (AFAFC) reviewed the military pay record on which this adjustment was made in November 1962. Major Nichols was asked to complete a "statement of service" to assure that proper pay adjustment would be made him. He completed this on January 16, 1963, listing enlisted service in the "Navy Reserve (ROTC) from September 3, 1949, to January 15, 1953"; as contrasted to the "enlisted Naval Reserve service from September 27, 1949, to December 18, 1952" which he had claimed when commissioned in the Air Force Reserve. He also listed his pay date as November 18, 1949. An adjustment of \$138.93 was paid to him on February 13, 1963.

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removal to Wilford Hall Hospital, Lackland Air Force Base, Tex. On October 14, 1967, he was placed on the temporary disability retired list. At this time, he indicated that he would elect to waive retirement pay in favor of benefits provided under laws administered by the Veterans' Administration. His remaining indebtedness to the Air Force of \$1,119.32 was, therefore, collected from the final pay and allowances due him which included a lump-sum leave payment. He did not exercise this option and is presently receiving retirement pay of \$611.93 a month.

The overpayments made to Major Nichols were the result of administrative error. There is no indication of a lack of good faith on his part or on the part of administrative personnel involved. He has repaid in full the overpayments made to him. There are no administrative provisions under which this repayment may be refunded to him.

In view of the special circumstances of this case, the Department of the Air Force interposes no objection to the enactment of H.R. 13859. If your committee favorably considers this bill, we recommend amending it to reflect the full description of the overpayment and to correct the period involved. On line 6, after the word "pay" add "and flight pay". On line , change "April 1, 1953" to "December 18, 1954".

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,

THOMAS H. NIELSEN,
Assistant Secretary of the Air Force.

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